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NO. 94-170

In The

Supreme Court of the United States

October Term, 1994

JEFFREY ROSENFELD,

Petitioner,

v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Bankruptcy Court's discharge of the debtor's pre-petition debts include cooperative maintenance assessments levied during the debtor's post-petition ownership of the real property?

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BRIEF IN OPPOSITION

Respondent, River Place East Housing Corporation (hereinafter, "River Place") respectfully submits the following Brief in Opposition in order to address certain omissions of fact from the Petition for Writ of Certiorari and responds to Petitioner's Question Presented.

STATEMENT OF THE CASE

Jeffrey Rosenfeld, the Petitioner, (hereinafter "Rosenfeld") is an experienced and sophisticated real estate attorney (4th Cir. Appendix p.293, lines 17-23 & 294 lines 1-11) who acquired a cooperative Unit. In his bankruptcy petition, Rosenfeld initially listed the Unit as having been taken by foreclosure by Trustbank, the holder of the first trust. He did not list the Unit as a potential liability or contingent future obligation. When he realized that Trustbank had not yet foreclosed, Rosenfeld signed a Consent Order affording Trustbank relief from the automatic stay to foreclose its trust against the Unit. Rosenfeld has not, however, executed a deed in lieu of foreclosure to Trustbank although he argues that the Unit is an "albatross" which no one is willing to foreclose or take title. Rosenfeld, as the record owner of the Unit, is able to convey title to anyone he chooses, to occupy or rent the apartment, to redeem his interest prior to foreclosure by any lienholder, to list his loss of income as a tax deductible expense and to exercise a host of other benefits and rights afforded under the covenants and state law; to date he has voluntarily chosen not to avail himself of such rights and benefits.

Although Rosenfeld argues to the Court that the cooperative maintenance assessment assessed by River Place after his petition constitutes pre-petition discharged debt, on his Schedule of Current Expenditures, he listed his continuing obligation for homeowners association assessments to other associations to which he is a member. (4th Cir. Appendix p.68 ¶1(d)).

When Rosenfeld filed his petition, he discharged approximately $2,300 in pre-petition cooperative assessments (42a) and, by the time River Place filed suit in state court against Rosenfeld, the post-petition maintenance assessments exceeded $3,000 (43a). The post-petition cooperative

maintenance assessments were for the upkeep of the common areas and other common expenses which arose during Rosenfeld's post-petition ownership. (47a)

REASONS FOR DENYING THE WRIT

The decision of the Fourth Circuit Court of Appeals was wholly consistent with the rulings of this Court. Although there is disagreement between the Fourth and Seventh Circuit Courts of Appeals with regard to this issue, impending legislation by Congress amending the Bankruptcy Code to clarify any question as to whether assessments for community associations are intended to be pre-petition debt invokes the doctrine of political question warranting abstention by this Court. Moreover, judicial economy dictates a denial of the Writ since the impact of any ruling by this Court would be de minimus and short-lived under the impending legislative clarification and steady decline in bankruptcy filings nationwide.

I. CONGRESSIONAL INTENT IS CLEAR

There is no question that the assessments at issue in this case were levied during the time after the debtor's petition in bankruptcy was filed. There is no confusion regarding Congress' intent that the assessments which were levied prior to the debtor's petition are intended to be discharged as pre-petition debt. All of the cases cited in Rosenfeld's Petition and in the few other cases addressing this issue nationally share this single consistent thread. The controversy stems from the characterization of the assessments which are declared or fall due after the petition in bankruptcy is filed.

Some courts, like the Bankruptcy Court in this case, have ruled that the assessments arise from a pre-petition contract

and are, therefore, pre-petition claims[1] while others, like the Fourth Circuit Court of Appeals in this case, have ruled that the assessments arise from a covenant running with the land and are, therefore, a post-petition debt of the debtor.[2] The cases evidence the uncertainty of the courts with regard to this question. Rosenfeld argues that the assessments are a pre-petition, contingent liability and are, therefore, discharged. He claims this is necessary to afford him the "fresh start" intended by Congress and yet, for his principal residence, he lists homeowners association assessments as a continuing post-petition liability for which he is obligated.

On p.16 of his Petition, in Footnote 11, Rosenfeld states that "[he] does not contend that a debtor should be allowed to live in a residence and not pay homeowner's association dues." It seems to the Respondent that the pre or post-petition

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[1] In Re Rosteck, 899 F.2d 694 (7th Cir. 1990); In Re Affeldt, 164 B.R. 628 (Bankr. D.Minn. 1994); In Re Elias, 98 B.R. 332 (Bankr. N.D.Ill. 1989); Matter of Wasp, 137 B.R. 71 (Bankr. M.D.Fla. 1992); In Re Miller, 125 B.R. 441 (Bankr. W.D.Pa. 1991); In Re Cohen, 122 B.R. 755 (Bankr. S.D.Cal. 1991); In Re Turner, 101 B.R. 751 (Bankr. D.Utah 1989); In Re Montoya, 95 B.R. 511 (Bankr. S.D.Ohio 1988); and In Re Behrens, 87 B.R. 971 (Bankr. N.D.Ill. 1988).

[2] In Re Rosenfeld, 23 F.3d 833 (4th Cir. 1994); In Re Val Moritz Invest. Group, Ltd., 116 B.R. 257 (Bankr. D.Colo. 1990); In Re Raymond, 129 B.R. 354 (Bankr. S.D.N.Y. 1991); In Re Hill, 100 B.R. 907 (Bankr. N.D.Ohio 1989); In Re Wetherbee, 1989 WL 110796 (Bankr. D.Colo. March 13, 1989); In Re Harvey, 88 B.R. 860 (Bankr. D.Colo. 1988); In Re Rink, 87 B.R. 653 (Bankr. D.Colo. 1987); In Re O'Mara, 141 B.R. 237 (Bankr. M.D.Fla. 1992); In Re McNeil, 128 B.R. 603 (Bankr. E.D.Pa. 1991); In Re Lenz, 90 B.R. 458 (Bankr. D.Colo. 1988); In Re Stern, 44 B.R. 15 (Bankr. D.Mass 1987); and In Re Strelsky, 46 B.R. 178 (Bankr. E.D.Va. 1985).

nature of the obligation should not change based on whether the debtor enjoys use of the property since, in all instances, he has the "right" to make use of the property. If the debt is "contingent" and, therefore, pre-petition, then it is not a post-petition debt of the debtor after discharge and any efforts to collect the debt would be improper. Even Rosenfeld, in his Petition, seems uncertain as to whether community association assessments are always pre-petition or always post-petition.

The question presented to the Fourth Circuit Court of Appeals, and now to this Court, is whether cooperative maintenance assessments levied after the filing of Rosenfeld's bankruptcy petition were within the Bankruptcy Code's definition of a "claim" and, therefore, discharged as pre-petition debt. Rosenfeld argues that the Fourth Circuit Court of Appeals misapplied federal law in finding that the debt arose post-petition. Rosenfeld rests his argument upon this Court's rulings in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991) and Pennsylvania Department of Public Welfare v. Davenport, 110 S.Ct. 2126 (1990) in which this Court found that the word "claim", as used in the Bankruptcy Code, was not plain upon its face and accordingly interpreted the statute to determine the meaning of "claim". River Place asserts that the ruling of the Fourth Circuit Court of Appeals is not inconsistent with those rulings and, further, that rudimentary principles of statutory construction and the express language of the drafters of the Code support the ruling of the Fourth Circuit Court of Appeals.

In both Johnson and Davenport, the Court turned to the legislative history behind the Bankruptcy Code to determine the legislature's goal in using the term "claim". Certainly, over time, references to legislative history have been essential in understanding Congress' intent. This Court's reference to the written history of such statutory provisions when the drafters are no longer available is well documented.

In this particular matter, Congress has recognized that there may have been some question as to its intent in using the term "claim" and has undertaken efforts to promptly clarify its meaning with respect to post-petition condominium and cooperative maintenance assessments. The Fairness to Condominium and Cooperative Owners Amendment of 1993 (hereinafter, the "Amendment"),[3] facing imminent passage by Congress, specifically clarifies that maintenance assessments levied after the filing of a debtor's bankruptcy petition are not dischargeable as a pre-petition claim.

Statutory interpretation is useful where Congress' intent is uncertain as in the instances under which Johnson and Davenport were decided. In the instant case, the statutory interpretation is simplified. Who better to advise the Court in its statutory interpretation than the drafters themselves. The Amendment was crafted by those responsible for drafting the Code - those with the position of establishing the statute and best informing us of the reasons for their drafting. In fact, the two leading co-sponsors in the Senate, Senators Di Concini and Thurmond, were instrumental in the drafting of the 1978 Act and have drafted this language to clarify any misconceptions about their intent regarding this specific issue under the Bankruptcy Code. It has been adopted by the Senate and has sixty-one (61) co-sponsors and clear signs of passage by the House of Representatives before the end of the year.

This Amendment offers the Court the clearest statutory construction available, the language of the drafters, to clarify

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3 House Resolution 1593, titled the Fairness to Condominium and Cooperative Owners Amendment of 1993, introduced by Representative Hyde of Illinois on April 1, 1993 and Section 312 of Senate Bill 520, known as the Thurmond/ Helms Amendment No. 1635, was adopted by the Senate on April 20, 1994 with a vote of 94 yeas and 0 nays.

any previous confusion which resulted from their language choices. The language of the amendment is not merely the musings of a Congressional staffer or the pontifications of a Congressional witness, it is the actual language of the future law. That language which embodies the express meaning and intent of the legislators - evidencing the outrage of their constituents that debtors would otherwise be able to discharge both pre-petition and post-petition maintenance assessments (for which all non-bankrupt co-owners must pay a proportionate share). While Congress, the judiciary and the public recognize the utility of allowing debtors to discharge pre-petition maintenance assessments, this Amendment is designed to ensure no misunderstanding of the true nature of post-petition maintenance assessments as non-dischargeable debt. It is the position of River Place that this information will guide the Court in using elements of statutory construction and the plain meaning of Congress to confirm the ruling of the Fourth Circuit which was, in all regards, consistent with the legislature's intent and with this Court's prior rulings.

II. JUDICIAL ECONOMY WARRANTS DENIAL

Taking action at this time is unwarranted, given the imminent actions of the legislature. The doctrine of abstention would urge the Court to defer ruling where its actions require an initial policy decision not within its judicial discretion and where its actions will be rendered nugatory in a brief period of time leading to the potential embarrassment of multifarious pronouncements by various branches on this single question. U.S. v. Munoz-Flores, 110 S.Ct. 1964 (1990); and Baker v. Carr, 369 U.S. 186 (1962).

To the extent that the Court finds a controversy to exist, River Place asserts that the controversy is a de minimus one,

not worthy of the Court's attention at this time. To date, only two circuits have seen fit to address this topic and only twenty cases are reported as addressing this issue throughout the nation.[4] Principles of judicial economy dictate that a controversy of such minimal impact, especially given the decline in the number of bankruptcy filings nationally and the pending legislative initiative to fully resolve the controversy, is not yet ripe for a ruling by this Court.

CONCLUSION

The ruling of the Fourth Circuit Court of Appeals, while different from that of the Seventh Circuit Court of Appeals, is consistent both with the rulings of this Court and with the legislative intent and should not be disturbed. Moreover, given the minimal impact of this issue, as evidenced by the few cases addressing the topic, and the near certainty that any ruling by this Court will be deemed nugatory in a short time by legislative fiat, this Court should deny Rosenfeld's Petition for a Writ of Certiorari.

Respectfully Submitted,

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4 See Footnotes 1 and 2, supra.